

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CORE WIRELESS LICENSING : DOCKET NO. 6:12CV100
:
VS. : TYLER, TEXAS
:
APPLE, INC. : MAY 1, 2014
:
9:30 A.M.

MOTIONS HEARING
BEFORE THE HONORABLE JOHN D. LOVE,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

MR. HENRY CHARLES BUNSOW
BUNSOW, DEMORY, SMITH, ALLISON
351 CALIFORNIA STREET
SUITE 200
SAN FRANCISCO, CA 94104

MR. CRAIG Y. ALLISON
BUNSOW DEMORY SMITH ALLISON
600 ALLERTON STREET, SUITE 101
REDWOOD CITY, CA 94063

MR. JACK WESLEY HILL
WARD & SMITH
1127 JUDSON ROAD, SUITE 220
LONGVIEW, TX 75606

FOR THE DEFENDANT:

MR. JOSEPH J. MUELLER
MR. TIMOTHY SYRETT
WILMER HALE
60 STATE STREET
BOSTON, MA 02109

MR. ERIC M. ALBRITTON
ALBRITTON LAW FIRM
111 W. TYLER
LONGVIEW, TX 75606

COURT REPORTER:

MS. JAN MASON
CERTIFIED SHORTHAND REPORTER
221 W. FERGUSON #100
TYLER, TEXAS 75702

PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY, TRANSCRIPT
PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

1 THE COURT: All right. Ms. Morris, you may call the
2 case.

3 THE CLERK: The Court calls Case Number 6:12CV100,
4 Core Wireless Licensing versus Apple.

5 THE COURT: Announcements.

6 MR. HILL: Good morning, Your Honor. Wesley Hill,
7 Henry Bunsow, lead counsel for Core Wireless, and his partner,
8 Craig Allison, and we're here and ready for the hearing.

9 THE COURT: All right. Thank you. For the
10 Defendant. Good morning.

11 MR. ALBRITTON: Good morning, Your Honor. Eric
12 Albritton for Apple. With me is Joe Mueller and Tim Syrett, as
13 well as Andy Song from Apple, and we're ready to proceed.

14 THE COURT: All right. Thank you.

15 All right. We're here for a hearing on multiple
16 motions. Unless counsel has other suggestions, I would
17 intend to take the motions in the order they were filed, so
18 the first motion being Docket Number 124.

19 MR. ALBRITTON: Your Honor, there has been an
20 agreement on one of the motions, the motion on commercial
21 success.

22 MR. BUNSOW: That's correct, Your Honor. We reached
23 a stipulation that we'll be submitting to the Court on that
24 one.

25 THE COURT: All right.

1 MR. ALBRITTON: And that just happened this morning.
2 Otherwise, we would have notified the Court yesterday, Your
3 Honor.

4 THE COURT: All right. Thank you.

5 Mr. Mueller, let me -- before you get into it, my
6 intention would be to take up the first motion but I'm going
7 to move to Core Wireless first on this one, so let me
8 hear -- I want to ask Core some questions about where we are
9 on this. Who will be responding or arguing the first
10 motion?

11 MR. BUNSOW: I'll be responding to that, Your Honor.

12 THE COURT: All right. Mr. Bunsow, my question on
13 this motion is, you know, both sides have piled a lot into
14 them. You know, there's a lot of interesting history and
15 background and it goes back and forth and -- but the bottom
16 line is, is what would be improper with permitting you -- how
17 many patents are in this case at this point?

18 MR. BUNSOW: I believe we have eight left.

19 THE COURT: Eight left, okay. Now, as I understand,
20 Apple has brought these counterclaims which say that you've,
21 you know, breached your FRAND obligations and you want to
22 counterclaim and say, well, in actuality it's Apple that has
23 breached theirs.

24 Now, what's wrong with focusing those FRAND type breach
25 of contract allegations on the eight patents at issue here,

1 rather than the -- is it an additional 1300 or something?

2 MR. BUNSOW: Correct, Your Honor.

3 THE COURT: In your client's portfolio. So what
4 would be wrong with that?

5 And I'll say this, there are two options here. One
6 would be I could sever out your claims as to the contention
7 that Apple has breached its FRAND obligations on the
8 remaining patents in your portfolio. I could sever them out
9 and put them in another case and stay that case while we
10 address this one, or I could just simply dismiss those
11 claims as to the remaining patents without prejudice. So
12 what would be wrong with that?

13 MR. BUNSOW: What's wrong with that, Your Honor, is
14 that it's an unworkable solution, and Apple knows that. If we
15 had a FRAND determination on these eight patents, then there
16 would have to be a FRAND determination on the next group of
17 patents and the next group of patents after that and the next
18 group of patents after that.

19 And this has been recognized by two courts, and
20 granted, it's an evolving area of the law and courts are
21 struggling with how to deal with standard essential patents
22 because of the portfolio situation. But it's not a
23 situation that technology companies haven't known about for
24 a long time.

25 For example, the whole purpose of these P.A. Consulting

1 reports that are the subject of our motion for sanctions is
2 that they specifically identify companies that have standard
3 essential patents. They give percentages of the overall
4 standard essential patents, and then in the database they
5 actually go into extensive detail on the individual patents
6 and what they cover and all those sorts of things.

7 So there is a framework that can allow courts to make
8 the global determination of FRAND rates on a portfolio
9 basis, and that was done in the Microsoft case by Judge
10 Robart. It was done in the Innovatio case by Judge
11 Holderman.

12 THE COURT: Now, let me stop you there. Now, you
13 talk about this was done by Judge so and so and this was done
14 by Judge so and so. So what -- what you're proposing, what
15 would it look like? I mean, are you -- is it a legal issue?
16 Is it for the Court to decide? Is it -- is there something
17 for the jury to decide here? I mean, what's the ultimate --
18 how is this ultimately presented in such a way --

19 I'll say, you know, it almost seems like we are -- this
20 is almost like a different case than what we're really
21 talking about here. I mean, you brought an infringement
22 case.

23 MR. BUNSOW: Correct.

24 THE COURT: I realize standard essential patents is
25 very important, I understand from an evidentiary standpoint,

1 from a framework standpoint for the fact finder to understand
2 what's going on here, it may be relevant. But to the level
3 that you're talking about it seems like it's almost a separate
4 case.

5 MR. BUNSOW: Uh-huh.

6 THE COURT: And it makes me wonder whether as you
7 describe it that it ought to be severed out into a separate
8 case for a determination that whatever it means to the
9 infringement case that you've brought, the Court could then
10 figure that out. But it seems very difficult to do what you're
11 describing, to do all that, what you've described as far as
12 these standard essential patents and who has an obligation to
13 do what, and also litigate the infringement issues, the
14 invalidity issues and everything else that typically comes,
15 damage issues that comes along in a typical patent infringement
16 case.

17 MR. BUNSOW: Sure, and I don't disagree, and that's
18 why it's not in the original complaint and that's why it came
19 up --

20 THE COURT: Well, so -- well, let me get -- let me
21 ask your position then on that. I don't know that I can
22 necessarily say that I fault -- if Apple wants to raise that
23 you have somehow improperly brought an infringement claim
24 because -- through some sort of framework on these standard
25 essential patents, you -- basically I think they're saying you

1 shouldn't be doing this, okay? I don't know that I can fault
2 them from doing that in a case in which they're accused of
3 infringing the patents. But by doing that, do they necessarily
4 then convert this into -- this seems like a very complex
5 portfolio standard licensing issue that -- I just don't know
6 how it fits. We're headed to a jury trial on patent
7 infringement, so what's a jury going to do with this?

8 MR. BUNSOW: Right. So let's start with how this
9 particular Court has looked at these things, and we have the
10 Ericsson V D-Link case in which Judge Davis made it very clear
11 that FRAND obligations is a two-way street. It's not a one-way
12 street as Apple would have it. So it is a two-way street.

13 We have put in our expert report a portfolio analysis
14 that we will rely upon, be it in front of the jury or the
15 Court, and we should talk about whether it's a Court issue
16 or jury issue. Mr. Allison and I actually had that
17 conversation driving over here this morning.

18 But nonetheless, we have put in Mr. Weinstein's expert
19 report, which we served on Apple a couple of weeks ago, not
20 only an analysis of these eight patents which are a subset
21 of the portfolio, but what we feel is the accurate portfolio
22 analysis based on third party evaluations of the universe of
23 standard essential patents, which is the best evidence
24 that's available to the parties today and that's the type of
25 evidence that indeed the other courts have relied upon in

1 coming to this determination.

2 The -- the portfolio analysis and standard essential
3 patents license issue is something that we feel is before
4 the Court now. If -- if we had an obligation to grant a
5 fair, reasonable and nondiscriminatory license as to these
6 patents, Apple had an obligation to negotiate the same, and
7 we believe in the context of our portfolio, to negotiate a
8 license in that portfolio. And we in fact did make what we
9 believed to be fair, reasonable and non-discriminatory
10 offers, but that's I guess going to be a subject of proof,
11 which by the way implicates things like the mediation
12 privilege and other things along the way.

13 But setting those aside, it doesn't make any sense to
14 do it piecemeal because honestly we will be here long after
15 any of us want to be here if we do it on a piecemeal basis,
16 and clearly that's not an appropriate way to deal with
17 standard essential patents.

18 Apple is a member of ETSI. They undertook that
19 obligation. Therefore, a portfolio analysis is binding upon
20 them.

21 We believe that we have sufficient evidence for either
22 the judge or the jury to make that determination. I believe
23 it's a jury issue because I believe that the obligation,
24 while that's a Court issue as a matter of law, the
25 quantification of that obligation I believe is a jury issue.

1 So we would propose to present that to the jury, just
2 like you would present any breach of contract case to the
3 jury. In the context of this case it dovetails very nicely
4 with the damages claim, because part of the damages claim is
5 going to be for the jury to determine what a FRAND
6 obligation is, and we would like to do this once and be
7 done. We don't want to have to come back over and over and
8 over and over again for all of the patents involved.

9 There are a hundred U.S. patents. The rest of them are
10 foreign equivalent patents. But nonetheless, we think that
11 a jury is suitable to make that determination. Jurors have
12 found FRAND rates. They did it in the Ericsson case here.
13 They did it recently in an LSI case in the Northern District
14 of California and then the Court has done it in the two
15 cases I mentioned.

16 So I don't think it's insurmountable. I think it's
17 properly part of the case. I think it can be part of the
18 trial, and I wouldn't think that it would -- it's going to
19 be another half hour or so of direct expert testimony
20 because frankly, the FRAND considerations and the
21 obligations are all going to be part of the main case
22 anyway, so the portfolio license part is just going to be
23 some additional -- sort of taking that analysis and
24 transporting it into the portfolio, into the portfolio
25 consideration for the jury. So it's not an insurmountable

1 situation.

2 THE COURT: Well, I know, you know, we're quite a bit
3 away from jury charge time, but you say you think it's for the
4 jury as far as this quantification at least, so what would such
5 a question look like? And give me a brief synopsis of how you
6 think a jury would be instructed on what they're doing here.
7 They're looking -- I guess what we're talking about is we're
8 talking about a claim that Core is making that Apple breached
9 its contractual obligation.

10 MR. BUNSOW: Correct.

11 THE COURT: So it's a type of breach of contract
12 claim.

13 MR. BUNSOW: Correct.

14 THE COURT: So what's the question, and briefly, how
15 are they instructed on what they would be answering?

16 MR. BUNSOW: Sure. So the question would be what do
17 you find is a reasonable royalty, fair, reasonable and
18 non-discriminatory royalty rate for the portfolio of Core
19 Wireless patents, and the answer would be a percentage.

20 THE COURT: Now, Apple raises the issue that the
21 problem -- one of the problems with what you're talking about
22 is because the eight patents at issue, the question is are they
23 valid, are they infringed, and the question with the remaining
24 portfolio patents is not are they valid, are they infringed.

25 MR. BUNSOW: Correct.

1 THE COURT: So, you know, of course, I run into this,
2 frankly, repeatedly in damages questions where we're trying to
3 get at the value of what the patented invention is, yet in the
4 real world, and of course, we're looking at a hypothetical
5 negotiation, but the real world is in typically non-litigation
6 licenses and litigation licenses, they're on a portfolio basis.
7 So I'm running in -- of course, running into this issue
8 repeatedly about what is the best evidence of the value of the
9 patented invention when you're looking at portfolio licenses.

10 So it's somewhat similar here, but they make the point
11 that these remaining patents, there's no proof of any of
12 this. Theoretically they could be just complete garbage
13 patents, you know, because we don't have the others
14 presented, they're not -- you know, experts aren't weighing
15 in on them and all that. So respond to that.

16 MR. BUNSOW: Sure. And I don't disagree with that,
17 but that's all subsumed in the analysis that would be done and
18 the jury's royalty rate would reflect that.

19 So what we have is a situation where Apple became part
20 of an organization. That organization required contributors
21 to offer patents on fair, reasonable and non-discriminatory
22 terms.

23 We're not the only ones that did that. In fact, we're
24 a large contributor but in the scheme of things it's a
25 fairly small percentage of the overall universe of patents.

1 Apple was obliged to do the same.

2 So we have a situation where the parties have all sort
3 of agreed to share this particular technology, and that
4 is -- that is totally separate from considerations of
5 validity and infringement. It is a sharing arrangement that
6 Apple is committed to and needs to honor as a member of
7 ETSI, and that's the obligation that Judge Davis says is a
8 two-way street.

9 And the opinion of our expert subsumes that and the
10 jury's determination of a reasonable royalty rate would
11 subsume that as well.

12 THE COURT: All right. Anything else at this point?

13 MR. BUNSOW: Not at this point, Your Honor.

14 THE COURT: All right.

15 MR. MUELLER: Good morning, Your Honor.

16 THE COURT: Mr. Mueller, you know, I kind of wanted
17 to get at what Core's position was on how this would work and
18 why this needed to work here. What you've heard, what's wrong
19 with that?

20 MR. MUELLER: So there's a few things, Your Honor,
21 and I would start by saying where you began I think is the
22 place we should end, and that is there could be an analysis of
23 the FRAND rate issues and the breach claims going both ways
24 with respect to the eight patents-in-suit.

25 The case has been narrowed down from 14 to 8 over the

1 last few months. We're moving in the right direction.
2 There's still over 50 claims left in the case. It's still a
3 large suit, but we are winnowing the issues through a
4 process by both sides, and that's going to arrive at we hope
5 something the jury could deal with in a jury trial with
6 proof by both sides, and the breach claims could be part of
7 that focused on the eight patents-in-suit.

8 So your proposal at the beginning I think is perfectly
9 sensible. We give them the opportunity to try their breach
10 claims with respect to Apple. I think they're meritless but
11 they have their claims, and they could make their case with
12 respect to the eight.

13 On the portfolio what they're asking for is something
14 very radical that no court has ever done, that no law
15 supports, and let me explain. If you unpack what they're
16 saying, what they're saying is Apple is obligated to pay
17 royalties on a portfolio basis without any proof of
18 infringement or validity or enforceability or even what the
19 patents are. They haven't even produced the patents in the
20 case. There's no production of the actual issued patents or
21 the file histories. It's just this abstract concept of the
22 portfolio.

23 Mr. Bunsow just said they could try that in a half
24 hour. In a half hour you can't get any sense of what we're
25 dealing with, and no court and no standard setting

1 organization has ever said anywhere that a party like Apple
2 or some other company that supplies products is obligated to
3 take a portfolio license as a matter of law. That's just
4 wrong.

5 The basic principle in the patent system is that you've
6 got to put forward your proof. You've got to prove your
7 case for infringement and you've got to rebut validity if a
8 challenge is made by the Defendant. That's equally true for
9 standards patents.

10 The FRAND commitment is intended to be a limit on the
11 rights of the patentholder, given the special circumstances
12 of the standard setting process, and that deals with
13 antitrust issues and all the rest. It's intended as a
14 safeguard. What they're doing is turning that into sort of
15 a lottery ticket around the traditional burdens of proof,
16 and no one has ever said that.

17 So let me just give a couple examples. This Microsoft
18 case with Judge Robart in Seattle, that was a case in which
19 Microsoft agreed voluntarily to pay a FRAND portfolio rate
20 and asked the Court to set it.

21 That's not this case. In this case Apple has always
22 limited its pleadings to the patents-in-suit, which were
23 originally 14 and now are eight. We have never made any
24 request for a portfolio claim.

25 The Ericsson case before this Court, Intel and other

1 Defendants made a request for a portfolio adjudication of a
2 smaller portfolio and asked the Court to set a rate. They
3 voluntarily made that choice, and Judge Davis held a bench
4 trial on that issue following the jury trial in that case.
5 Again, no such claim is being made in this suit.

6 In Innovatio, that's a case in which the Defendants
7 sought a FRAND rate on a group of patents that were asserted
8 by the Plaintiff and the Judge held a bench trial on what
9 the FRAND rate would be. But interestingly and importantly,
10 the Judge said that rate wouldn't be effective until later
11 trials on infringement and validity. That's the Court
12 recognizing you can't force someone to pay for something
13 until there has been proof of infringement and a rebuttal of
14 validity.

15 So none of those cases say a word about a Defendant
16 being required and being capable of being coerced by the
17 Plaintiff to pay royalties on the full portfolio without any
18 proof of infringement or validity, and that's really what
19 they're saying. They're not just asking the Court to set a
20 rate or the jury to set a rate. They want Apple to pay it.
21 They want Apple to pay for a portfolio of patents without a
22 shred of proof or shred of evidence as to what those patents
23 are, whether they're actually being used, whether they're
24 valid, whether they're enforceable.

25 No court has ever said that, and it's counter to basic

1 principles in the patent system. Not just standards patents
2 but every patent. You have to prove your case, and they're
3 trying to do a shortcut around that.

4 If they were right, why didn't they assert this claim
5 at the very beginning? There's no need to prove
6 infringement on eight patents if they're right and they can
7 just come forward and ask the jury to force Apple to pay
8 royalties on the entire portfolio. It doesn't make any
9 sense. They never would have brought their case in the
10 first place on particular patents if they were right about
11 this portfolio claim.

12 And this is a portfolio claim that they unveiled
13 for the first time last -- in July of 2012 after having
14 multiple opportunities to amend their pleadings. It just
15 doesn't make any sense.

16 So, again, what I would suggest is Your Honor's
17 proposal at the beginning is the right proposal. They can
18 try their breach claims with respect to the eight
19 patents-in-suit. The jury is going to have the evidence on
20 those eight patents-in-suit. We can deal with separately
21 whether there's any issues that the Court needs to resolve
22 outside the presence of the jury.

23 We haven't briefed that issue, and frankly, I want to
24 consider it a bit further. But I think the bottom line is
25 wherever we arrive at, bench versus jury, this should be a

1 case about eight patents, or hopefully fewer if they drop
2 more along the way.

3 It makes no sense as a matter of law and no sense as a
4 matter of procedure to inject 1300 patents that haven't been
5 produced, that haven't been the subject of any meaningful
6 evidence in this case, and that there's no legal basis
7 for the claim they're trying to assert. It makes no sense
8 to inject that claim into this case.

9 So we would respectfully request that Your Honor
10 dismiss the portfolio piece and let them try whatever theory
11 they want to try on the actual patents-in-suit.

12 THE COURT: Okay. Thank you.

13 All right. What I'm going to do on this is I'll give
14 Core some options here. What I'm going to do is we're going
15 to go forward here with these FRAND assertions going both
16 ways, if that's the way the parties want to do this, on the
17 patents that are in-suit that are going to be set up, teed
18 up for trial.

19 The remaining FRAND obligations that relate to the
20 portfolio I can do a number of different ways. I can just
21 simply dismiss them without prejudice. I can sever them out
22 into a new cause number and stay that. I can just simply
23 leave it in this case but tell you we're just going to try
24 the FRAND breach of contract claims related to whatever
25 patents are in-suit teed up for infringement. And then the

1 Court can look at, as we get closer, what, if anything, the
2 Court needs to do. Does the Court need to take some action
3 on the remaining portfolio based upon what the jury found?
4 Does the Court need to do something prior or as part of the
5 trial? Does the Court need to do nothing and just
6 ultimately dismiss them and let it be done, you know,
7 refiled and handled in a different way and at a different
8 time?

9 I can do that I think a number of different ways, but
10 we're going to go forward with the patents that are in-suit
11 that are alleged to be infringed. So, Mr. Bunsow.

12 MR. BUNSOW: We'll take door three.

13 THE COURT: Okay.

14 MR. BUNSOW: And let me explain why. I believe that
15 if we go forward with just the eight, clearly FRAND
16 considerations are going to be part of that analysis and there
17 could very well be collateral estoppel issues that the Court
18 could apply post-verdict, as you've suggested, that could
19 impact the obligation of either party in terms of an
20 over-arching royalty to the portfolio.

21 We think that's the way the law is going. I think
22 we'll have some more guidance maybe even from the CAFC on
23 that by the time of trial in January and certainly by the
24 time post-trial motions are resolved and the like.

25 So our preference would be to keep it in the case. You

1 can sever that issue as you've suggested, which I'll state
2 my objection to it, but nonetheless, I understand the
3 procedure, and I think that makes the most sense if we're
4 not going to go forward in the main case with it.

5 THE COURT: All right. That's what I will do then is
6 I'll keep these within the case but they will not be on course
7 for trial. And then as things develop, the parties can put
8 forward their various positions on them.

9 You know, ultimately obviously it's my hope that, you
10 know, and I think it would be beneficial to everyone that
11 this be rolled -- of course rolled into these issues and
12 ultimately resolved pre-trial, post-trial. You know, I
13 don't know that continuing to fight this out is beneficial
14 to anyone.

15 But with that said, that's the way we're going to
16 proceed.

17 MR. MUELLER: Can I ask one practical question?

18 THE COURT: Yes.

19 MR. MUELLER: So we're in the midst of expert reports
20 right now and the next round is due in the next few days
21 actually. I take it from Your Honor's ruling that we would not
22 be addressing those portfolio claims in expert reports and we
23 would wait until any follow-on proceeding after the jury trial?

24 THE COURT: Correct.

25 MR. MUELLER: Thank you, Your Honor.

1 THE COURT: All right. Let's move to the next
2 motion, which is the motion to compel production of
3 non-privileged documents from Third Party Mosaid Corporation.

4 MR. SYRETT: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. SYRETT: As Your Honor is aware, Mosaid, which is
7 now known as Conversant, is the parent company of Core Wireless
8 and it acquired Core Wireless along with the asserted patents
9 and the others that we've been discussing this morning, Nokia,
10 which was the original owner of the patents, and Microsoft, and
11 it's the documents relating to that negotiation that are at
12 issue here.

13 I want to be very clear about the time frame we're
14 discussing relating to those documents. They all predate
15 any final agreement between the parties. There is a
16 securities filing from 2011 that we've attached as Exhibit
17 15 to our opening brief that is from Mosaid where they
18 described that Mosaid began discussions with Microsoft and
19 Nokia about this transaction in March, 2011, and that a deal
20 wasn't reached until September, 2011, following, quote,
21 extensive negotiations.

22 Now, the documents that we're seeking here all fall
23 within that period, from March, 2011 when the discussions
24 began and then prior to September, 2011 when a final
25 agreement was reached and when the parties, by Mosaid's

1 admission at the time, were conducting extensive
2 negotiation.

3 And Microsoft and Nokia now have an economic interest
4 in the outcome of this case and in Core Wireless's business,
5 but the patents were transferred, as Core Wireless has pled,
6 outright to Core Wireless so they now, following the
7 transaction, are the sole owners of those patents.

8 We think the documents during the negotiations are
9 quite likely to be very relevant to our defenses here. They
10 may show, for example, Nokia's valuation of the patents.
11 They may show Nokia's understanding of the scope of the
12 claimed inventions. And so we set about trying to obtain
13 the documents through a subpoena to Mosaid and it has been a
14 moving target to try to get the documents.

15 The first justification for the privilege was that
16 there may have been strategic discussions. Then that was
17 sharpened to suggest that there were discussions of
18 offensive patent assertion between the parties. And then
19 finally there has been a suggestion that there was a claimed
20 defensive interest with respect to antitrust issues.

21 But if you look at the -- if Your Honor looks at the
22 description of the documents that have been withheld,
23 for the most part that third explanation about the antitrust
24 issues is not reflected. It's not the basis on which Mosaid
25 has withheld these documents as set forth in its privilege

1 log.

2 So there are two separate bases they claim for
3 withholding these, the common interest and the work product
4 protection, and I'll start with the common interest. And on
5 this record there's no showing that these documents were the
6 subject of a common legal interest during this period when
7 again they were beginning discussions and extensively
8 negotiating their rights and their relationships.

9 The Fifth Circuit in the Santa Fe case that we've cited
10 says common interest can apply when your co-defendant or
11 potential co-defendant is under a palpable threat of
12 litigation and it's one that the privilege must be construed
13 narrowly, and there's no way to do that here consistent with
14 what Mosaid has suggested.

15 They have offered two explanations of the common
16 interest. The first is that there were discussions of
17 offensive patent assertion.

18 And with Your Honor's permission, some of the
19 discussions at issue here are from confidential or
20 deposition transcripts that have been designated
21 confidential, and with Your Honor's permission, I'll get
22 into the details but I would ask Mr. Song from Apple to
23 leave and would seek leave later to seal this portion of the
24 transcript.

25 THE COURT: Okay.

1 MR. SYRETT: Or I'm happy to point Your Honor to
2 pages and do it at a more general level.

3 THE COURT: Well, it's up to you.

4 MR. SYRETT: Okay.

5 THE COURT: Whatever -- I think that if you're, you
6 know, making a request to seal this part of the transcript, you
7 know, let me know. Is that the --

8 MR. SYRETT: Yes, that is the request, yes, Your
9 Honor.

10 THE COURT: All right. Yes, if Mr. Song would depart
11 then. Thank you.

12 MR. SYRETT: Thank you, Your Honor.

13 (Mr. Song leaves the courtroom.

14 (Excerpt redacted by order of the Court.

15 (MR. Song re-enters the courtroom.

16 MR. ALLISON: Core Wireless thinks this is exactly
17 the kind of case that the common interest privilege and the
18 work product doctrine apply to.

19 On March 13th the companies, Nokia, Microsoft and
20 Mosaid, got together to discuss the enforcement of a large
21 set of patents. They immediately signed an agreement for
22 confidentiality, which is the first basis of a common
23 interest privilege. They knew that there was going to be
24 confidential information discussed and they made sure that
25 it was going to stay confidential.

1 They started the discussions. They -- and later on as
2 the discussions got more deeply into the patents, they
3 signed a common interest agreement, which was -- which was
4 signed to be effective April 28th, and that's the point at
5 which some very detailed documents were exchanged about the
6 patents.

7 The discussions during that time period, between March
8 13th and September 1st of 2011, included discussions about
9 the value of the patents, which of course includes whether
10 the patents are going to be found valid or infringed, how
11 strong the patents are, how strong the portfolio is, the
12 sort of legal issues that are required to make this sort of
13 deal.

14 And also the intent of this deal was to -- was to
15 enforce a very large patent portfolio of about 2000 patents,
16 and there's -- of course any rational person making a deal
17 like that would realize that litigation is a distinct
18 possibility when you take a broad enforcement campaign
19 against a number of potential licensees, so this is in the
20 minds of the participants from the very beginning, that
21 there was a high likelihood of litigation. And that wasn't
22 an irrational belief because litigation did occur quite
23 shortly after the deal was made.

24 The second thing that was on their minds as they were
25 having these discussions was potential antitrust and

1 regulatory issues, because when you transfer several
2 thousand patents, sometimes regulators of various
3 jurisdictions are interested and they want to inquire about
4 that. Again, that was not an irrational belief on the part
5 of the people because shortly after the deal was done,
6 Google filed a complaint with the European union and there
7 was an investigation done of this deal, and I think that
8 investigation is continuing on.

9 So the parties rationally believed that there was a
10 palpable threat of litigation of one type or another, and in
11 fact, that did occur. So this seems to be exactly the case
12 that the common interest privilege is designed to protect,
13 the case when parties have discussions about the merits of
14 legal issues in the context of potential litigation that is
15 likely to occur and in fact did occur.

16 The same thing with the work product doctrine. This
17 is -- all the parties were under the assumption that
18 litigation was likely to occur and in fact it did occur, so
19 the same considerations would apply there.

20 Mr. Syrett has talked about the Santa Fe case, the
21 Fifth Circuit case here. The facts are quite different from
22 this case. In the Santa Fe case there were -- basically
23 some parties got together. General counsel made a memo
24 about antitrust issues that he circulated among various
25 companies. Basically apparently the memo was about how not

1 to get yourself in trouble with the antitrust law. There
2 was no threat of litigation at all at the time. In fact, it
3 was five or ten years later that litigation arose that this
4 document was even related to, so there was no real palpable
5 threat of litigation at the time.

6 That's quite different from the case we have here where
7 the enforcement campaign was going to start immediately
8 after the deal was done and that's what in fact happened.
9 And they were talking about litigation that would likely
10 occur very shortly thereafter.

11 THE COURT: Now, when you say -- were there specific
12 targets discussed, specific target licensees or potential
13 litigation targets?

14 MR. ALLISON: There were -- the kind of documents, in
15 a broad scope -- obviously I want to avoid revealing privileged
16 information in open court.

17 THE COURT: Right. I'm just trying to get a general
18 sense if that's the type of thing that may have been discussed.

19 MR. ALLISON: Yes. My understanding is they were the
20 sort of documents that are -- a part of this group of documents
21 would be documents regarding the actual merits of the patents,
22 you know, are they infringed or not, and documents related to
23 damages issues, which was what sort of license revenue could
24 possibly be obtained from various target -- various potential
25 licensees. So I -- there were documents of that sort here, and

1 of course if there were documents, there were likely
2 discussions about those documents.

3 THE COURT: Okay. Now, Apple points to Mr. Shaer's
4 testimony. They rely on that heavily as indicating there were
5 not any type of strategic discussions, it was all, you know,
6 the nuts and bolts of a business deal is what I think they're
7 getting at through his testimony. So how do you kind of fit
8 what he said with your position that these documents are
9 privileged?

10 MR. ALLISON: Sure. Let me say two things about
11 that. First of all, we said that some of the quotes were taken
12 out of context. One thing we meant by that was some of the
13 quotes were dealing with the very early days of the discussion.
14 Obviously when Mr. Shaer and Mr. Lindgren showed up in London
15 on March 13th, I believe it was, to talk about the deal, that
16 was -- there were other people that Microsoft and Nokia were
17 talking to. That was the point at which -- the very early days
18 of the deal. So of course at that point the discussions would
19 have been more business oriented.

20 But as the time progressed, of course, then -- and this
21 common interest agreement was signed, of course the
22 discussions got more substantive than that. So some of the
23 quotes that we have were really talking about very early,
24 the very first conversations.

25 The second thing is that Mr. Shaer is not the only

1 evidence here. We submitted a declaration of Mr. Lindgren
2 who was also present at every single one of these meetings,
3 and his declaration clearly said that there were legal and
4 strategic discussions that took place during those -- that
5 period of time between March and September of 2011.

6 THE COURT: What is -- what is his name again?

7 MR. ALLISON: John Lindgren.

8 THE COURT: How do you spell that?

9 MR. ALLISON: L-I-N-D-G-R-E-N, I believe.

10 THE COURT: Lindgren, okay.

11 MR. BUNSOW: He's the CEO.

12 MR. ALLISON: Right, he's the CEO, and again, he was
13 at every single meeting with Microsoft and Nokia as far as I
14 know.

15 THE COURT: Okay. Well, here's where I am on this
16 motion. I think the Court's intention would be to review these
17 documents in camera that are at issue. I understand I believe
18 from Core's response you don't have any objection to that.

19 MR. ALLISON: Right.

20 THE COURT: Don't see any problem with that. Well,
21 then can you give me those documents presented to chambers for
22 in camera review by say a week from today?

23 MR. ALLISON: Sure.

24 THE COURT: So by May 8th deliver to chambers
25 documents raised in Apple's motion, specifically raised, log

1 entries, those are to be presented to the Court in chambers on
2 or before May 8th.

3 Okay. Anything else on this motion? I'll look at
4 those and then I'll make a ruling on the motion at that
5 time. If I need any further briefing on it, then I'll
6 invite briefing at that time after I've had a chance to
7 review the documents.

8 MR. ALLISON: Let me just for your -- it might help
9 you in your review, there actually are a couple of periods of
10 time here that are sort of different. There's before and after
11 the application of the common interest agreement. Most of the
12 documents are after that, after April 28th. Those are the
13 large group of documents. Before that there's really only
14 about -- I think we found 16 documents that are actually
15 separately --

16 THE COURT: Okay. Do also present, if we don't have
17 it already, your privilege log.

18 MR. ALLISON: Okay, sure.

19 THE COURT: With the documents, present the log that
20 you provided to Apple for me to look at.

21 MR. ALLISON: Okay. We'll do that.

22 MR. MUELLER: Your Honor, before you move on, can I
23 raise one question for you?

24 THE COURT: Sure.

25 MR. MUELLER: On the first motion, just to make sure

1 we all have it straight as we work on expert reports and the
2 rest, the procedural posture, as I understand Your Honor's
3 ruling with respect to portfolio claims, Your Honor would be
4 staying the motion to dismiss as to the portfolio claims?

5 THE COURT: Well, what I would really like to do is
6 based on what I've said is I'm not going to dismiss them at
7 this point. I'm going to essentially set them aside. I'm not
8 going to sever them out into a separate case. I'll set them
9 aside, stay the case as to that portfolio claim. So my
10 intention was to deny the motion as moot based on my ruling.

11 Ultimately, you know, of course, I'll have to see --
12 like I had said, if y'all can work it out, great. If the
13 Court has to ultimately decide what to do with them, they
14 may ultimately be dismissed, but I would like to handle
15 Docket 124 denied as moot, set those aside.

16 MR. MUELLER: Sure enough. We just wanted to make
17 sure there's no prejudice to our ability to argue legal
18 problems with those claims at some later date when they're
19 taken up.

20 THE COURT: No. Everything is still on the table
21 with regard to them. I want to set them aside and let's get
22 this case tried as to what's teed up for infringement.

23 MR. MUELLER: Okay. Just two final questions, Your
24 Honor, or one note and one question. We understand we will not
25 be addressing these claims in the expert reports, but the one

1 other question -- this did not come up in the argument and I
2 just made a note of it after I sat down and I omitted it
3 earlier. I didn't hear a word about the unjust enrichment
4 claims.

5 We would request that even as to the eight
6 patents-in-suit, there's just so many problems with those as
7 a matter of law -- and I don't think Core Wireless is really
8 even vigorously defending them at this point -- that they be
9 dismissed. They're preempted. They're improper as a matter
10 of Texas state law. They are time barred.

11 So even if the contract claims, which is what the focus
12 of the arguments were, went forward on the eight, there's
13 just no plausible, from a legal perspective, unjust
14 enrichment claim even as to those eight.

15 THE COURT: All right. Core's position on unjust
16 enrichment as to the eight patents that are in the case, breach
17 of contract, what's the position?

18 MR. BUNSOW: Our belief, having researched this
19 recently, is that the -- that if there is an express breach of
20 contract, there cannot be unjust enrichment.

21 THE COURT: All right. So based on that, I will as
22 to -- well, are you withdrawing your unjust enrichment claim,
23 Mr. Bunsow?

24 MR. BUNSOW: It's in the alternative on the portfolio
25 license aspect of it, Your Honor, so the answer is no. I think

1 it should be handled the same way as you were handling the
2 portfolio license determination.

3 THE COURT: Well, what would -- okay. I mean, what
4 you typically get, I guess, if you're going to get a question
5 on the eight patents as related to FRAND obligations,
6 alternatively the jury would be asked about unjust enrichment I
7 guess. Is that what you're saying? Is that what you're asking
8 for? You're saying it's in the alternative but you're still
9 wanting to pursue it as a matter of a jury question?

10 MR. BUNSOW: Right. So if Apple said that there was
11 a contractual obligation, that would moot the unfair
12 competition, but we're not there. If the jury found that there
13 was a contractual obligation, that would moot the unfair
14 competition claim.

15 THE COURT: Well, here's what I'm going to do. I'm
16 going to deny the motion as moot as a whole at this point. I
17 think that I want to -- let's let this progress for awhile
18 longer. I think some of this may -- y'all need to just kind of
19 get your positions kind of set more clearly on what you're
20 going to say on the eight patents, okay? Then later on,
21 depending on that, let me look at it as we get closer, maybe
22 other issues get teed up. You know, I don't know that it will
23 ever become an issue, but if it does, then let me look at it at
24 that point.

25 MR. BUNSOW: That's fine, Your Honor. Thank you.

1 MR. MUELLER: Thank you, Your Honor.

2 THE COURT: All right. So Docket Number 183, I'll
3 deny that motion as moot based upon the stipulation the parties
4 have reached today.

5 So let's go to Docket Number 188. Who will be arguing
6 that for Core, 188, the motion to compel discovery and
7 discovery sanctions, Apple's late incomplete production of
8 P.A. Consulting reports and databases?

9 MR. BUNSOW: I'm prepared to argue that, Your Honor.

10 THE COURT: All right. Go ahead.

11 MR. BUNSOW: This case began with a very detailed
12 complaint that made two points as strongly as we could make
13 them. The first is that the patents-in-suit cover the
14 standards that are applicable to certain ETSI standards, and
15 the second was through the specification of 2000 paragraphs we
16 identified the particular standards sections that we believe
17 Apple products practiced and allege that those products met
18 those particular standard requirements.

19 THE COURT: Okay. Mr. Bunsow, let me just ask this.
20 You know, this motion is a motion to compel discovery and seek
21 discovery sanctions. Now, what is it that you're seeking to
22 compel at this point? What do you not have that you believe
23 you're entitled to?

24 MR. BUNSOW: We believe we're entitled to some
25 additional discovery on Apple's knowledge of the P.A.

1 Consulting reports, and let me give you two examples.

2 Before this came up we had subpoenas out to take the
3 depositions of Boris Teksler and Mr. Chip Lutton.

4 Mr. Teksler had the position that Mr. Risher has now and
5 Mr. Lutton was the chief intellectual property counsel at
6 Apple, and both of them were engaged in the negotiations
7 with Nokia for the earlier license. They were very involved
8 in the subject matter of this case.

9 We agreed not to take their deposition in return for
10 Apple agreeing not to call them at trial, because so far as
11 we could tell, the issues that we knew about at that time
12 were probably hearsay-based, and apparently Apple agreed.

13 But in any event we withdrew the subpoenas. They no
14 longer work for Apple, either one of them. We withdrew the
15 third party subpoenas and agreed not to take their
16 depositions.

17 Subsequently we learned through Mr. Risher's first
18 deposition that the P.A. Consulting reports are used by
19 Apple in their FRAND determinations. They're used by Apple
20 to drive their negotiations.

21 We have never seen them. They were not produced with
22 their Rule 26 disclosures that were due in October of 2012,
23 and it was now about 14 months later in January of 2014 we
24 asked Apple why they hadn't produced them and demanded that
25 they be produced and we got a lot of push back and a lot of

1 delay and they were finally produced after the close of
2 discovery for the first time, along with the databases.

3 So one area of discovery that we would like is the
4 opportunity to take reasonable discovery of Apple, including
5 potentially Mr. Teksler and Mr. Lutton, on knowledge and use
6 of the P.A. Consulting reports.

7 After we brought this issue to Apple's attention, there
8 were many meet and confers, and at the 11th hour Apple said
9 that they would produce Mr. Risher for a limited two hour
10 deposition on the subject. We've quoted from that
11 deposition fairly extensively in our papers and I won't go
12 over that, other than to say that basically Mr. Risher said
13 he had a late night short conversation with Mr. Teksler
14 where Mr. Teksler told him he didn't rely on the reports.
15 But I think it's fair to say that Mr. Risher was unable to
16 represent the universe of people that could have had access
17 to these reports that would have known about it.

18 Basically these reports cost \$50,000. They're
19 extensive. The database goes on and on and on, identifies
20 individual particular patents, identifies several of the
21 patents-in-suit, and we don't believe that a technology
22 company like Apple would buy these just to let them sit
23 around with -- to no purpose.

24 So we would ask for limited discovery, and that may be
25 as simple as a 30(b)(6) witness and a short deposition of

1 Mr. Teksler and possibly Mr. Lutton if it turns out that
2 people further identify Mr. Lutton as having knowledge about
3 the reports.

4 THE COURT: So you mention a 30(b)(6) on this topic,
5 so obviously you're dissatisfied with Mr. Risher.

6 MR. BUNSOW: I think that's fair to say, Your Honor,
7 and we quoted from Mr. Risher's deposition. And I'm not here
8 to slam Mr. Risher. I've known him for a long time, and I
9 think given the limited time that he had to look into this, he
10 did the best he could, frankly.

11 But I think he was told the night before he had to
12 appear, at least that's what he said in the deposition. He
13 made a phone call to Mr. Teksler, who is no longer an
14 employee of Apple, and that was pretty much the sum and
15 substance of his information. So I think we need a more
16 fulsome analysis.

17 THE COURT: Okay. Now, so this 30(b)(6) would be --
18 characterize for me the topic that you would want to discuss in
19 the 30(b)(6). What would you be asking Apple to put up a
20 witness to talk about?

21 MR. BUNSOW: Right. The topic would be access by
22 Apple employees to the P.A. Consulting report. That's where we
23 would start. We want to know everybody who had access to it,
24 and then as to those who had access to it, we would want to
25 know what use they made of it. And we would like to be able to

1 challenge the proposition that's been put forth that even
2 though they pay a substantial amount of money for these, they
3 don't do anything with them, it sits in a file somewhere and
4 nobody looks at them. We simply don't think that's the case.

5 THE COURT: And as far as Teksler and Lutton, they
6 don't work for Apple any longer, so are you asking leave to
7 extend the discovery period to subpoena Mr. Teksler and
8 Mr. Lutton so you may --

9 MR. BUNSOW: I would prefer to do this on a stage
10 basis. I would like to know who from Apple could respond to
11 the 30(b)(6) notice, and if there was nobody available or the
12 only people available said, as Mr. Risher at least in part
13 said, that Mr. Teksler had seen the reports, then we may very
14 well need to renew the 30(b)(6) or the third party depositions,
15 but at this time I'm hoping that's not necessary.

16 THE COURT: All right. Now, I guess the second part
17 of your motion is for sanctions for Apple -- I guess for
18 Apple's late and incomplete production. You say -- basically
19 what I understand you're saying is ultimately we did receive
20 the reports, the database, but this was late and it was on an
21 incomplete basis. They finally completed production on this
22 and you're wanting sanctions for that failure, is that correct?

23 MR. BUNSOW: We've -- we've received some of the
24 reports. We have not received the LTE reports at all.

25 THE COURT: So are you asking for an order to --

1 MR. BUNSOW: Yes, we are.

2 THE COURT: Now, let me ask you specifically on the
3 LTE. Okay. Are there any other reports that you have not
4 received?

5 MR. BUNSOW: Those are the only ones we know of.

6 THE COURT: Okay. On the LTE reports, Apple's
7 position is in part on those that they're irrelevant to this
8 litigation.

9 MR. BUNSOW: I understand that.

10 THE COURT: What's your position on that?

11 MR. BUNSOW: Our position is that LTE analysis is
12 relevant to this, and in particular, because in our own expert
13 reports LTE is part of the analysis that goes into reasonable
14 royalty rates and damages and the like. So we think it clearly
15 could lead to the discovery of admissible evidence and LTE
16 considerations are in our expert's damages report.

17 THE COURT: So --

18 MR. BUNSOW: I agree that LTE per se is not in the
19 eight patent case, but I believe the analysis and the
20 information could be relevant.

21 THE COURT: So the way Apple looks at LTE type
22 patents related to the FRAND type negotiation is relevant in
23 your expert's mind to how these royalty rates would be
24 calculated on the eight patents-in-suit?

25 MR. BUNSOW: In order -- yes. So to be clear, what

1 our expert has said is that LTE rates are relevant to rates
2 under the other standards.

3 THE COURT: Okay. And does he say that just on the
4 basis that there's similarities in the technology and in the
5 way technology is viewed in the industry, that correlation can
6 be drawn from the LTE negotiations to the types of negotiations
7 that would be involved with the eight patents?

8 MR. BUNSOW: It's all of the above. It's the same
9 companies. It's the next stage of the technology, and there
10 are some published figures for FRAND royalty rates, depending
11 on quantities of patents, for example. There is -- there are
12 published articles about regression analysis and the like,
13 depending on numbers of patents. And his position is that
14 what's happening in the LTE world is instructive in the other
15 areas as well.

16 THE COURT: Okay. So what I'm hearing from you is
17 what you're asking the Court to do is compel production of LTE
18 reports and a 30(b)(6) deposition from Apple on the topics that
19 you just outlined?

20 MR. BUNSOW: That's correct, and sanctions.

21 THE COURT: Okay. Now, the sanctions issue, what
22 Apple says in part to that is that you were aware of these
23 reports early on and they heard nothing about them for months.
24 Now, you may have outlined why -- as I understand you were
25 going to depose these witnesses. They said, you know, we're

1 not going to call them at trial so we'll withdraw our
2 subpoenas. Then I think you got some information that Apple
3 did use the reports in FRAND negotiations. Is that what
4 prompted you to pursue these? Because they say there's this
5 big huge seven month gap where if we're late producing them, we
6 didn't know we were late because you never -- you knew about
7 them and you never said anything.

8 MR. BUNSOW: Okay. They were late producing them
9 from the day their Rule 26 disclosures were due. That was
10 several months after they were found in the Motorola case to
11 have improperly delayed production of similar reports in that
12 case.

13 They had them when the Rule 26 reports were due. They
14 knew standard essential nature of these patents was a
15 critical issue in this case and they should have produced
16 them then.

17 They subsequently produced some expert reports from
18 other litigation that referred to P.A. Consulting reports,
19 but there was nothing that said that in this case that Apple
20 had these reports or would use them in FRAND negotiation.
21 It was Mr. Risher's deposition in which he identified the
22 P.A. Consulting reports as something that Apple uses in
23 coming up with the FRAND protocol.

24 Let me give you a little background on that. So we
25 have been wrestling with Apple to try and figure out what

1 kind of FRAND protocol we can possibly agree upon to come up
2 with a number in this case, and Apple had said, well, you
3 know, we do it -- this is kind of in the context of
4 mediation so I'm not going to get into very much detail. We
5 do it this particular way, and we said, well, we'd like to
6 do it this particular way. Obviously the numbers are
7 different.

8 In his deposition when we asked Mr. Risher the type of
9 information that Apple used in order to make FRAND
10 determinations, he referred to these P.A. Consulting
11 reports. And I don't remember the actual date of his
12 deposition but it was late 2013, if I remember correctly.
13 That's when we started asking for them. We asked for them
14 in early January of 2014 and we were denied on the basis
15 that these are confidential and the property of P.A.
16 Consultants and we don't have permission to disclose them.

17 We pursued that. We had a conversation with P.A.
18 Consulting. The gentleman inside P.A. Consulting didn't
19 realize that there was a protective order in this case,
20 wasn't told that apparently, and ultimately said fine, you
21 know, as long as they're protected, the confidentiality is
22 protected, you can have them.

23 Then they imposed the additional restriction that we
24 had to treat them like source code. We could come look at
25 them and designate portions. That was the first time when

1 we went and looked at them to designate portions, that was
2 the first time that we realized that there was this database
3 that specifically identified some of the patents-in-suit as
4 standard essential patents. And we renewed our demand that
5 they produce them, and we got further push back until after
6 the close of discovery.

7 That's the chronology, all right? So if you want to
8 talk about delay, delay starts with the Rule 26 requirement,
9 and they had been told by another Court that they shouldn't
10 delay in producing these. That's the delay.

11 THE COURT: All right. Now, so you made a motion for
12 sanctions. You've outlined why. What's the -- I know it's in
13 the motion or at least at that stage when the motion was
14 drafted this was the sanction you were seeking. What is the
15 sanction you're seeking at this point?

16 MR. BUNSOW: That Apple had notice as a result of its
17 possession of these reports that the identified patents-in-suit
18 were standard essential patents, and we have specified the
19 particular language in the -- excuse me, in the motion papers.

20 THE COURT: All right. Thank you. Response.

21 MR. MUELLER: So there's a lot to address there, Your
22 Honor, and there's a lot in the briefing as well. I'm going to
23 focus on the facts. I think that their briefing has been
24 characterized by very reckless allegations of lying by me,
25 lying by Mr. Risher, lying by another attorney that represents

1 Apple. Really allegations that are unbecoming an officer of
2 the Court that have no evidence to support any of them.

3 What I'm going to do is to not focus on these
4 inflammatory allegations, which are just wrong, but on the
5 factual record. I'm going to start with what we're talking
6 about here, the reports themselves.

7 These are third party materials generated by a British
8 firm called P.A. Consulting. They are available to anyone
9 who wants to purchase them. As Mr. Bunsow said, they are
10 available for purchase for a fee. I presume that Core
11 Wireless has paid that fee. They have a copy of the reports
12 themselves and have had them for some undetermined amount of
13 time. We've asked how long they've had them. They've never
14 told us.

15 They produced their copy of them in February, over a
16 month after the close of document production in December.
17 So, you know, what we're really talking about here is a
18 motion to compel and for sanctions for materials generated
19 by a group called P.A. Consulting that they had a copy of
20 and that they produced within weeks of the production by
21 Apple. It's a remarkable position they're taking.

22 But the short of it is they have a copy of P.A.
23 Consulting materials. It's no secret to anyone. It's a
24 third party, and they produced two different forms of
25 documents. They produced narrative reports that describe in

1 prose certain trends in the cellular industry with respect
2 to declared essential patents, and some of those trends
3 would include companies declaring more patents as essential
4 than are actually essential and they have attempted to study
5 that phenomenon in certain ways.

6 So that's one part are these narrative reports. Those
7 have been used by Apple over the years repeatedly. They
8 have been used by Apple in license negotiations. They've
9 been used by Apple in litigation, and that is no secret.

10 We produced materials, Your Honor, in June of 2013,
11 nearly a year ago, pursuant to this Court's order requiring
12 production of materials from other litigations, and those
13 included a large number of expert reports and deposition
14 transcripts.

15 And if I could respectfully direct Your Honor to
16 footnote four in Core Wireless's opening brief on this
17 motion, in that footnote they cite to some of the materials
18 that we produced in June of 2013.

19 Now, Mr. Bunsow just said the first they heard of
20 Apple's use of P.A. Consulting was Mr. Risher's deposition.
21 That's wrong. That footnote shows it's wrong. That
22 footnote quotes deposition testimony that we produced in
23 June of 2013 that refers by name to P.A. Consulting and
24 describes how Apple used those narrative reports.

25 So there has been no hide the ball here. These are

1 materials that were produced a long, long time ago that
2 spelled out exactly how Apple uses these third party
3 reports.

4 Now, distinct from those narrative reports are a second
5 category of information that P.A. Consulting makes available
6 as a subscription, and that is this Microsoft access
7 database, which has some underlying data. The licensing
8 department doesn't use that for various reasons, but they
9 don't use it and Mr. Risher explained that they don't use it
10 at his 30(b)(6) deposition on these issues.

11 We didn't know they even had it, the litigation team,
12 the in-house counsel working on this case, until the motion
13 was -- or until the request was brought, at which point we
14 did a search of e-mail archives and discovered a copy of it
15 and produced it.

16 So there's this conspiracy theory about me lying and
17 Jeff Risher lying and Ann Cappella from Weil Gotshal lying.
18 It's wrong and it's reckless and it's incorrect. There's
19 been no lying, no hiding the ball, nothing of the sort.

20 Again, we made clear in June of 2013 that Apple had
21 used the narrative reports by P.A. Consulting. They were
22 named by name in those materials that went to Core Wireless.
23 So they received notice of Apple's use of these materials
24 nearly a year ago. They apparently had their own copy of
25 P.A. Consulting materials, yet never made any follow-up

1 request that they be given the full materials that Apple had
2 copies of.

3 That request was made in January of 2014. When it was
4 made, within a matter of weeks we went through the back and
5 forth with P.A. Consulting to give them notice. We arranged
6 for an inspection of the materials. Core Wireless came and
7 selected the ones that they wanted produced formally. We
8 did. We produced the reports that they wanted in their
9 entirety, the one exception being LTE, which I'll get to.
10 We produced the segments of this Microsoft access database
11 that no one had looked at, but we nonetheless made it
12 available for inspection. They reviewed it, identified
13 portions to be produced, and we produced them. Then we made
14 Mr. Risher available for a 30(b)(6) deposition on those
15 issues.

16 So even though they had waited until January, despite
17 knowing about these materials over a year ago or nearly a
18 year ago, we really bent over backwards to give them
19 everything they were asking for to try to eliminate any
20 issue on this.

21 Mr. Bunsow referred to meet and confers, and there
22 were. There were meet and confers on this issue and over
23 time we tried to give them as much as we thought they
24 reasonably could have need for. But not once during those
25 phone calls was any mention made of sanctions, okay? The

1 first we heard about that was an e-mail following one of our
2 telephone conferences where they referred to sanctions, and
3 we said what do you mean by sanctions. And this whole
4 sideshow came about at the end of the meet and confer
5 process, without any proper vetting with us.

6 Had they asked questions like did you, meaning me, know
7 about this database from the Motorola litigation, I could
8 have explained to them this briefing they're referring to
9 predated my time on that case. They didn't even ask. They
10 didn't even make an attempt to find out the basic facts, and
11 instead, rushed to court and made reckless allegations that
12 turned out to be false.

13 The other point I'll mention is this, Your Honor. This
14 P.A. Consulting database, you have the narrative reports
15 which have been used by Apple, this Microsoft access
16 database that has not. They're trying to characterize the
17 database as some sort of smoking gun, and it really, if you
18 look at it, Your Honor, and look at the substance of the
19 entries, is hardly that.

20 There are now eight patents in the case. Five of them
21 are not mentioned. Three of them are mentioned, and I don't
22 want to reveal any confidential information about those
23 three, but you have before Your Honor in the briefing the
24 entries for those three and the entries describe one of them
25 as not essential, okay? So now we're down to two. And

1 for the remaining two the descriptions include critiques of
2 the patents and the technologies that I think are actually
3 quite unhelpful to Core Wireless.

4 So this notion that we've been sort of hiding this
5 smoking gun is really belied by the actual text of these
6 three entries in the database.

7 So at the end of the day what you have is a third party
8 hearsay report that would never be admissible in any trial
9 to establish liability. It's a third party report. There's
10 no authentication of it, no explanation of the methodology
11 used to generate that database, no attempt to subpoena P.A.
12 Consulting, for that matter, despite the fact that they had
13 their own copy of the report and surely knew about it.

14 So this document is not one that could be admitted at
15 trial, and yet they're trying to turn it into something that
16 it really is not.

17 THE COURT: When you refer to a report, what report
18 is that?

19 MR. MUELLER: Sure. So again, there's two things
20 here and I think it's important to keep them -- the distinction
21 in mind. There are narrative reports, and if you read them,
22 it's a description of trends in the industry and what the over
23 declaration rate is for the industry as a whole and for
24 particular companies. That's the part that Apple has relied on
25 over the years. And again, the particular ways in which Apple

1 has used it, we produced a lot of material about that very
2 subject in June of 2013. So that's category one.

3 Category two is this Microsoft access database that we
4 found in an electronic archive in response to their specific
5 request. As Mr. Risher testified truthfully, by the way, at
6 his deposition, it's not used by the licensing folks at
7 Apple. They use the narrative reports, not the access
8 database.

9 Now, they do have a copy of it, okay? They do have a
10 copy and we found it when they asked for it and we produced
11 it, and so they have had it. But it's not the portion of
12 the P.A. Consulting reports that are used.

13 The last -- I'm sorry, Your Honor. Please.

14 THE COURT: Well, here's what this comes down to is
15 that you had -- you had certain disclosure obligations as part
16 of this case and Core Wireless points these out, and what I
17 just need to get to the bottom of is whether you, and by you of
18 course I mean Apple --

19 MR. MUELLER: Sure.

20 THE COURT: -- produced -- obviously this is a
21 standards case. It's a standard essential patent case. It's
22 what Apple's procedures, processes for, first of all, obviously
23 particularly with regard to these patents-in-suit, but
24 generally how do they -- this is obviously the allegation.
25 This is what Core says. Look, we couldn't have been more

1 clear. This is standard essential, you know, on and on. So
2 did you, as of those obligations coming -- arising, produce
3 what you had in a timely fashion?

4 MR. MUELLER: And we did, and let me be specific.
5 This is at page three of our opposition brief to the motion,
6 Your Honor.

7 So before this P.A. Consulting issue arose, we had
8 produced over 4,000 pages of documents describing this
9 subject, how Apple values FRAND patents, including 26 expert
10 reports, 23 transcripts of expert or fact witness
11 depositions, 18 responses to interrogatories and requests
12 for admission and six transcripts of trial testimony of
13 expert and fact witnesses.

14 We also produced a series of letters and policy
15 statements that we had submitted to ETSI and the
16 International Telecommunication Union regarding Apple's
17 position on FRAND.

18 We had also produced Mr. Risher for an earlier
19 deposition at which he was deposed all day, not for two
20 hours but all day, on how Apple values FRAND patents.

21 This material was more than sufficient to show how
22 Apple goes about the process of valuing FRAND patents and
23 amply met our disclosure obligations.

24 There are a million documents in the world that refer
25 in some way or relate in some way to standards patents, and

1 I'm sure there's many more that Core Wireless has that they
2 haven't produced to us. What the parties are obligated to
3 do is to make productions that are sufficient to show how
4 they approach these issues, and we did that. Really, Your
5 Honor, we did I think much more than was necessary to
6 establish how Apple values FRAND patents.

7 What they're doing is plucking on one thread of that
8 production and saying, well, you should have given us more
9 on that one thread. But that one thread was no secret. If
10 they wanted more, they could have asked for it.

11 But we had more than met our obligation. To the extent
12 they wanted us to go above and beyond it, which is really
13 what they wanted, we did that too when they finally asked in
14 January of 2014.

15 So the answer to your question, Your Honor, is we
16 absolutely met our obligations and we did so in a timely
17 fashion.

18 And if I could just say a few words, Your Honor, about
19 sanctions. I don't think there's any motion to compel here
20 because there's nothing really left. We've given them the
21 reports. We've given them a deposition of Mr. Risher. You
22 asked about the topics of another 30(b)(6) deposition.

23 Those are exactly the topics they've already asked
24 Mr. Risher about and about which he testified truthfully.

25 The only thing concrete I can see that they are seeking

1 in the motion to compel are these LTE reports, and the only
2 basis they used to defend that request is the portfolio
3 claims. Well, those are now moot or stayed or whatever the
4 status is, but they're not going to trial next January so
5 there's no need for them to go into another cellular
6 standard and take discovery into it when it's not -- it
7 holds no relationship to the eight patents-in-suit. I think
8 Mr. Bunsow conceded that. It's not comparable technology
9 with respect to those eight patents-in-suit. Those deal
10 with older, more primitive technologies, and I think any
11 attempt to use LTE to analogize an LTE royalty rate to those
12 patents would be defective on that basis. And they really
13 haven't even tried to make that defense until just today.

14 So the LTE reports are the only thing concrete that I
15 can see they're seeking and there's no ground for that
16 request. So I think at the end of the day they have what
17 they need and they received it before expert reports. Their
18 damages expert has cited to some of the P.A. Consulting
19 materials. Whatever mileage they can get out of them
20 they'll get, but there's really nothing left here to compel.

21 On sanctions the cases are so far removed from this
22 fact pattern, I think it's remarkable they're even making
23 the request. Those cases are about deceptive conduct, you
24 know, an intentional failure to abide by a court order,
25 misrepresentations to the Court.

1 There's nothing of the sort here, Your Honor. I have
2 not lied to the Court or Core Wireless. Jeff Risher has
3 not. Other Apple counsel have not. There's not a shred of
4 evidence to suggest otherwise. We've met our obligations at
5 every turn in this case and we've done our best to abide by
6 every court order the Court has entered.

7 THE COURT: All right. Thank you. Mr. Bunsow,
8 anything else on this?

9 MR. BUNSOW: Yes, Your Honor, briefly.

10 THE COURT: All right. Go ahead.

11 MR. BUNSOW: First of all, I would refer Your Honor
12 to pages 10 and 11 of our opening brief which recounts the
13 testimony from Mr. Risher as the 30(b)(6) testimony we have so
14 far. It was woefully inadequate in terms of identifying who
15 had access to the reports and when they had access to the
16 reports.

17 This is a really what did you know and when did you
18 know it inquiry. This goes to willful infringement. We're
19 not offering these third party reports as proof of standard
20 essential nature. We're offering them as proof that Apple
21 knew that they may be using standard essential patents and
22 they knew that, and we should have been given these reports
23 with the Rule 26 disclosures, not after we had to badger
24 them for it beginning in January of 2014.

25 Yes, they gave us some expert reports from other cases

1 and those expert reports did refer to some P.A. Consulting
2 reports. In the Motorola case they were different P.A.
3 Consulting reports. But nonetheless, it was Mr. Risher's
4 first deposition testimony where they were clearly
5 identified as something that would be pertinent in this
6 case, this case for setting FRAND royalty rates.

7 In addition, they talk about our having P.A. Consulting
8 reports, but what you weren't told are a couple of things.
9 We found out after we gleaned the significance of these
10 reports. When we couldn't get them from Apple, we canvased
11 all our people, what do you know about these reports, how
12 can we get them and does anybody have access to them. One
13 of our employees over in Europe said at another job I had
14 access to them. I have an old copy. It was from 2006-2007,
15 and it was only the narrative portion. It wasn't the
16 database, and it's the database that specifically identifies
17 the patents-in-suit as being within these standard essential
18 categories.

19 So that's what we have. That doesn't say anything
20 about what Apple had, when they had it, and that they had
21 notice of the potential standard essential nature of these
22 very patents that are in this case.

23 That's the problem. That's why we're asking for
24 sanctions. That's why they should have been produced. I
25 would submit that's likely why they weren't produced.

1 That's probably why they weren't produced in the Motorola
2 litigation either until the eve of the filing of the summary
3 judgment motions, and they were criticized about that.

4 I believe Mr. Mueller when he says he didn't know about
5 it from his participation in that earlier case. I believe
6 him. I think that's probably true. But anybody at Apple
7 who was involved in that case -- and we know Apple closely
8 watches its cases. Mr. Song is here today. Undoubtedly
9 somebody inside Apple was at the Motorola case as well.
10 Given the strong language the Court used in that case, Apple
11 knew about it. Apple is the real party in interest here.
12 Apple knew about those reports. And if they didn't make
13 them available to litigation counsel to meet their Rule 26
14 requirements, that's bad on Apple.

15 And it's one or the other. There's simply no
16 justification for not producing them.

17 THE COURT: Well, from what I'm understanding, what
18 Mr. Mueller just got up and just told me was there are reports
19 from P.A. Consulting that talk about trends in the industry
20 and, yes, we use those, but we never use -- and there's sworn
21 testimony I think to this effect -- this database that
22 specifically references the patents, some of the
23 patents-in-suit.

24 Now, I agree with you. It's what did Apple know and
25 when did they know it, but it has been represented to me

1 that yes, we use these reports. We think you knew about
2 them. When you asked about them, we gave them to you. But
3 this database, the sworn testimony is we didn't use it,
4 didn't even know about it. So that's just sort of where we
5 are.

6 I don't know really, you know, what else other than,
7 you know, this second 30(b)(6) deposition that you want. I
8 guess the question is, is there enough here to compel me to
9 order another 30(b)(6) deposition on this.

10 MR. BUNSOW: Right, and I would -- as I said, I would
11 refer you to pages 10 and 11 where we talk about Mr. Risher's
12 testimony. For example, in the first paragraph he admitted
13 that many employees at Apple had access to the P.A. Consulting
14 databases, including the entire patent development and IP
15 transaction groups.

16 MR. MUELLER: Your Honor, I'm sorry to interrupt, but
17 if we're going to read deposition testimony --

18 MR. BUNSOW: This is not testimony. It's --

19 MR. MUELLER: It's under seal.

20 MR. BUNSOW: I understand.

21 THE COURT: So is there a request for Core to --

22 MR. MUELLER: If we could, Your Honor, if we're going
23 to read this testimony.

24 THE COURT: All right. If we could have Core's
25 representative please leave the courtroom. Thank you.

1 (Mr. Smetana left the courtroom.

2 (Excerpt redacted by order of the Court.

3 (Recess.

4 THE COURT: All right. The final motion is Docket
5 Number 190, Apple's motion to preclude or alternatively compel
6 Core Wireless to produce Nokia employees for deposition.

7 MR. MUELLER: Thank you, Your Honor.

8 So this motion really comes down to a basic issue of
9 just wanting a fair playing field and a level playing field
10 for both sides.

11 Your Honor has before you in the briefing the
12 procedural history that led us to this point on the Nokia
13 discovery, and it goes through all the twists and turns in
14 the case. But I want to sort of cut through that a little
15 bit, although I'm happy to answer any questions Your Honor
16 has on the details, and really arrive at the bottom line,
17 and the bottom line is Core Wireless has a relationship with
18 Nokia, is entitled to cooperation from Nokia, and certainly
19 in important respects Nokia stands to benefit from any
20 successful outcome in this case by Core Wireless.

21 In light of that relationship, point one, and point
22 two, our inability to get any discovery from Nokia at the
23 same time that Core Wireless is getting apparently whatever
24 they want, we think there's a real fairness issue.

25 We were told for many months that Core Wireless did not

1 intend to call any Nokia witnesses. When they changed their
2 position, which was their right to do, but when they changed
3 their position and said, no, we do intend to call Nokia
4 witnesses, almost immediately they were put on calendar for
5 deposition without any formal subpoena.

6 In contrast, we have been seeking through multiple
7 different ways and multiple different procedural vehicles to
8 get Nokia witnesses, none of whom have been offered for
9 deposition.

10 On the document side, even with respect to these
11 depositions that are -- that have been offered by Nokia for
12 the Core Wireless witnesses, we've asked, you know, will we
13 receive the technical documents for those witnesses in
14 advance, will we receive certain licenses that we've
15 requested many, many times in advance of their licensing
16 witness's deposition. No response. No commitment.

17 At the same time Core Wireless has produced certain
18 Nokia documents that it obtained from Nokia, invention
19 disclosure records, for example.

20 So on both the document side and the witness side, you
21 have a situation where one party in this case is getting
22 what they want. The other party is getting nothing, and
23 that's not fair.

24 Our proposal to the Court really is either we should be
25 entitled to reciprocal discovery and we should have a level

1 playing field, or they should be precluded from using this
2 one-sided discovery that we have received to date. It's
3 just not fair or right or procedurally proper for a party to
4 get what it wants and not to offer anything in return.

5 THE COURT: Okay. Well, setting aside all the
6 circumstances that led us to this point, but -- so let's take
7 the Nokia witnesses that you want to depose. Now, where do we
8 stand on that? I mean, how many are there, who are they, and
9 what -- where do we stand on scheduling those depositions?

10 MR. MUELLER: Sure. There's really -- there's three,
11 three witnesses, Your Honor, that we've sought, and I think
12 with respect to those three we might even be willing to
13 withdraw our request for one of them, leaving two.

14 The two people would be, one, an inventor on a named
15 patent-in-suit, and second, a person who's an inventor on
16 another Core Wireless patent but has been involved in
17 standard setting processes for Nokia, and we have reason to
18 believe that he has knowledge of relevant events for the
19 patents-in-suit, although he's not a named inventor. So two
20 witnesses.

21 THE COURT: Now, are these the witnesses that Core
22 contends are not within the control of Nokia?

23 MR. MUELLER: Correct, Your Honor. They have told us
24 that they can't make them available, and the major argument is
25 they're employees of Nokia Solutions Networks, which is a

1 wholly owned subsidiary of Nokia that Nokia controls, whose
2 employees Nokia lists as its own employees for purposes of
3 certain securities filings. It's a false corporate distinction
4 and it's not a proper roadblock to discovery.

5 So it's two witnesses. Then, Your Honor, we have also
6 sought and targeted a very specifically crafted request for
7 documents, both technical documents for these witnesses and
8 for the ones that they're going to depose and a subset of
9 Nokia licenses, and those are relevant for lots of reasons
10 in this case but they're also relevant to help us question
11 one of the witnesses that Core Wireless is offering for its
12 own purposes, who is the head of licensing at Nokia.

13 So our position is that we've made very narrowly
14 targeted document requests and narrowly targeted witness
15 requests. Again, we're really talking about two people at
16 this point, and at most three, and that's reasonable.

17 THE COURT: So again, these -- well, let me tell you,
18 you've got to either tell me two or three.

19 MR. MUELLER: Sure.

20 THE COURT: Who do you want?

21 MR. MUELLER: We can say right now, Your Honor, two,
22 and I can give you the names if you like.

23 THE COURT: Okay. Give me the names.

24 MR. MUELLER: So the two names, Your Honor -- let me
25 make sure I spell these correctly -- would be Mika M-I-K-A

1 Forssell F-O-R-S-S-E-L-L, and Karri Ranto Aho. I'll spell that
2 as well. It's three names, three words: K-A-R-R-I, middle
3 name R-A-N-T-O, last name A-H-O.

4 So those are two people, Your Honor, that we believe
5 are important material witnesses that have not been tendered
6 for deposition. And in addition to those two people,
7 documents for those two and the witnesses that they intend
8 to depose.

9 THE COURT: Okay. And -- and the importance of Mika
10 Forssell is what?

11 MR. MUELLER: Named inventor.

12 THE COURT: Named inventor on one of the
13 patents-in-suit?

14 MR. MUELLER: Correct.

15 THE COURT: Employed by NSN, which you contend is a
16 wholly owned subsidiary of Nokia?

17 MR. MUELLER: Correct. And the second, Mr. Aho,
18 is -- has knowledge of Nokia standardization technologies
19 relating to the patents-in-suit, although he's not a named
20 inventor. So we are seeking him for discovery that's pertinent
21 to the eight patents-in-suit, and in particular, his work on
22 standard setting organizations.

23 THE COURT: All right. Response. Let me ask first,
24 there's this contention that you're going to depose Nokia
25 employees and you've not produced relevant documents related to

1 their knowledge that Apple contends they need to depose these
2 individuals. What's your position on that?

3 MR. ALLISON: At the first of the case we asked Nokia
4 to give us documents related to the technical aspects of the
5 patents, conception, reduction to practice, whatever the sort
6 of normal things you get in a patent case. Nokia produced
7 documents. They gave documents to us. Our understanding is
8 they gave us what they had. We produced all those documents a
9 year ago, year and a half ago.

10 I'm not aware -- I mean, we've gone through that with
11 Nokia. They asked for the documents. They provided them to
12 us and we produced them. I'm not aware that there are any
13 more documents on conception or reduction to practice or
14 those sorts of things that -- related to the patents that
15 Nokia would have.

16 THE COURT: Okay. Mr. Mueller.

17 MR. MUELLER: Sure. I mean, respectfully, that's not
18 the extent of what we asked for. We've also asked -- I'll give
19 you two examples. One would be specific documents and we've
20 actually listed by date meetings at ETSI where these witnesses
21 were present and we asked for their notes and files from those
22 standardization meetings, which are directly relevant to the
23 issues in this case. That's one category, standardization
24 related work from these witnesses.

25 Second is these licenses, and we've asked over and over

1 and over again for Nokia's licenses with chip suppliers that
2 supply the chips in these mobile devices, Qualcomm being one
3 example. We've also asked for Nokia's licenses with
4 infrastructure providers like Ericsson that make the base
5 stations. Those could be relevant to liability in so far as
6 they may have licensed technology that's now being accused.
7 It could also be relevant to damages.

8 With Mr. Melin's deposition as head of licensing
9 scheduled for two weeks from now, we've not received a
10 single license from Nokia and those are documents we've
11 requested for many, many, many months.

12 THE COURT: Okay. Response.

13 MR. ALLISON: Licensing -- this is the first we've
14 heard why they're relevant at all. I've never heard that this
15 was for the Melin deposition before. We asked several times
16 why they're relevant and we didn't get an answer.

17 Nokia has not given us their licenses. Nokia does not
18 feel that Core Wireless needs to see its other licenses in
19 other cases. We simply don't have them. Nokia has
20 indicated no willingness to provide those documents to us.

21 Apple has asked for -- has gone to the Hague Convention
22 to get certain documents from Nokia, their own confidential
23 documents that we would not have and would not be expected
24 to have. If it takes awhile -- apparently it's been very
25 slow. They started about a year ago with these discussions.

1 They're still continuing on with them. It seems to be
2 taking quite a long time. We don't have any objection if it
3 takes longer as long as we get it before trial.

4 But, you know, I don't know how Core Wireless can tell
5 Nokia what it's supposed to produce and what it's not
6 supposed to produce.

7 MR. MUELLER: Your Honor, if I may respond briefly.

8 THE COURT: Yes.

9 MR. MUELLER: Respectfully, this is the problem is
10 that if we were just seeking Nokia discovery ourselves and Core
11 Wireless were not seeking any form of discovery from Nokia,
12 that would be one thing. But what's really unfair is for them
13 to be able to call as a witness, without even a formal
14 discovery request, the head of licensing from Nokia and then
15 for Core Wireless and Nokia to tell us but you're not going to
16 get any documents in advance of the deposition.

17 And respectfully, we have made clear why we need those.
18 In the last week we sent two more reminders to Nokia's
19 counsel asking if we could receive the licenses before the
20 deposition. Not a word in response.

21 So whether it's Core Wireless or Nokia behind the
22 scenes who stands to benefit from this case, this is why
23 preclusion would be an appropriate remedy if all we get is
24 one-sided discovery. That can't be the right way to conduct
25 discovery in this case. Either we get the documents and

1 have fair notice of what they say and are allowed to
2 question the witnesses about them or preclusion would be
3 appropriate.

4 THE COURT: Okay. So you're talking about there are
5 depositions upcoming that you're saying Core is going to take
6 and one of them is Mr. Melin?

7 MR. ALLISON: M-E-L-I-N.

8 THE COURT: Okay.

9 MR. MUELLER: Correct.

10 THE COURT: And are there others set?

11 MR. MUELLER: There's two depositions of witnesses
12 that Core Wireless wants that Nokia has offered. There's two
13 that have been scheduled for May 13th and 14th I believe, in
14 about two weeks.

15 MR. ALLISON: Right. Mr. Melin is the 13th and
16 there's an inventor named Esa Malkamaki, who's on the 13th, and
17 so we have asked for Nokia's cooperation and they have given us
18 that.

19 MR. ALBRITTON: You might want to spell that for Ms.
20 Mason.

21 MR. ALLISON: M-A-L-M-A-K-I. I think I did that
22 wrong. M-A-L-K-A-M-A-K-I. First name is Esa, E-S-A.

23 MR. MUELLER: So for the inventor what we seek would
24 be the technical documents that that person has knowledge of.
25 We haven't received one. For Mr. Melin we would ask for the

1 licenses.

2 MR. ALLISON: For -- let me respond to that comment.
3 For the technical documents, as far as I know there's nothing
4 else to be produced. We have actually made that inquiry and
5 we've got what they have. I'm not aware there are any
6 technical documents --

7 THE COURT: Okay. So as to Mr. Malkamaki, inventor
8 deposition, you provided all the technical documents that
9 you're aware of relevant to that deposition?

10 MR. ALLISON: Yes.

11 THE COURT: All right. Now, Mr. Melin. Now,
12 Mr. Mueller, you gave me two categories of documents you
13 believe you're entitled to and have not been produced. Now,
14 one of these you mention -- one of the categories is licenses,
15 Nokia licenses. Now, you're talking about -- well, briefly
16 tell me again the relevance of these.

17 MR. MUELLER: Absolutely. And just very, very
18 briefly, for the first witness, in addition to the conception
19 and reduction to practice documents, again we've asked for ETSI
20 participation documents from that witness.

21 THE COURT: Let me stop you.

22 MR. MUELLER: Sure.

23 THE COURT: ETSI participation documents as to
24 Mr. Malkamaki.

25 MR. ALLISON: I have not received a request for that

1 from Mr. Mueller and apparently -- was this in some sort of
2 document from Nokia that --

3 MR. MUELLER: Well, it was and we've requested this
4 from Nokia, who presumably would have possession of them, but
5 you've been copied on all this correspondence. This would
6 be -- one place we have requested it, not the only, would be
7 the Hague Convention schedule.

8 And one quick side note on that, Your Honor, we
9 actually went to Nokia and Core Wireless last year, months
10 before we came to the Court, and gave them a draft of the
11 Hague Convention request and said can you take a look at
12 this. Maybe we can work this out. We also wanted them to
13 review it for confidentiality. So we've really bent over
14 backwards to try to do this in a collegial way and we
15 haven't received anything.

16 But the ETSI documents are one category. The second is
17 the licenses. And to Your Honor's question on that, there's
18 two subsets. One would be licenses with chip suppliers for
19 mobile devices and second would be licenses for
20 infrastructure providers for cellular systems. And one
21 example would be someone like Ericsson to the extent there
22 were licenses with Ericsson.

23 THE COURT: And the relevance of those is what?

24 MR. MUELLER: Two types of relevance, Your Honor. To
25 the extent that Nokia licensed some of the patents-in-suit

1 which originally belonged to Nokia before they were transferred
2 to Core Wireless, there could be patent exhaustion arguments or
3 implied license or express license defenses that we could make
4 by virtue of their having license components in Apple devices
5 or in the networks that those devices use. So there is a
6 liability piece. These could provide outright defenses to any
7 form of liability.

8 The second form of relevance is damages. To the extent
9 that they have licensed certain chip makers, that could be
10 probative of what a reasonable royalty would be. We would
11 have to look at the particulars to see that for sure, but
12 certainly it would be a place we want to look.

13 Now, I'll note that we're not seeking every Nokia
14 license. We're not asking for every license with handset
15 providers, for example. We believe the patents that are
16 being asserted in this case are directed to chip level
17 technology and so we have asked for chip level licenses,
18 plus licenses to infrastructure that relates to the devices,
19 systems in which the devices run, and that's it.

20 MR. ALLISON: Okay. First of all, I have never heard
21 these arguments before this moment from Apple. We have -- in
22 the last few weeks we have received e-mails and we've asked
23 repeatedly why they want licenses. We don't understand the
24 relevance, and we've received no response other than the
25 general response that we think they're relevant. I have never

1 heard these specific arguments before today, so we're -- to be
2 honest, it's a little hard to respond to them.

3 I don't see why licenses for other -- these generally
4 tend to be cross licenses between Nokia and other players,
5 and of course, the patents-in-suit would be a very small
6 part of those licenses and there would also be cross
7 licenses. So I'm not sure how those relate to damages, but
8 it doesn't appear to us that these licenses have much
9 relevance.

10 That's not the purpose we're asking to speak with
11 Mr. Melin. We were going to ask him about issues about
12 Nokia in general and research and development and FRAND
13 issues, those sorts of things. We were not going to ask
14 questions about specific licenses.

15 MR. MUELLER: I don't want to get into a he said/she
16 said, but we did make this clear multiple times over the
17 course.

18 MR. ALLISON: The second thing is I also don't recall
19 any e-mails about ETSI documents. As far as I know, most ETSI
20 documents are public documents. These things are done in the
21 public. There are many notes that are made publicly. The
22 specifications are public. The final documents are public.
23 There's lots of information that you can get on the Website
24 about what happened at ETSI and who was at what meeting and all
25 that. I'm not sure there are relevant private documents

1 around.

2 Again, this is another thing that I haven't been asked
3 for and I -- whether there are any private, non-public
4 documents about any of these witnesses, you know, we haven't
5 looked into it.

6 THE COURT: Well, let me say this. We're talking now
7 about -- so, Mr. Allison, the two deponents, Nokia employees,
8 are Mr. Melin and Mr. Malkamaki. These are the two that you're
9 going to depose. Are there any others?

10 MR. ALLISON: Yeah, there's actually four in total.
11 There's Mr. Toskala, who's an inventor, T-O-S-K-A-L-A. He's
12 already had his deposition taken last week.

13 THE COURT: All right.

14 MR. ALLISON: Then there's Harri Lilja. L-I-L-J-A is
15 his last name, H-A-R-R-I. He's an inventor and we haven't set
16 the date yet but Nokia has agreed to have his deposition -- to
17 have him sit for deposition, and those are -- then there's
18 Mr. Malkamaki and there's Mr. Melin and I'm missing -- who am I
19 missing? Mr. Jukka Vialen, last name V-I-A-L-E-N, Jukka
20 J-U-K-K-A, another inventor, and he's an employee of Cassidian
21 and we have contacted him. He agreed to cooperate with us and
22 he agreed to have his deposition taken.

23 THE COURT: Well, let me say this about these. Let's
24 just take these deponents. What does concern me greatly is the
25 idea that -- and this is what Mr. Mueller says, that there's

1 cooperation between Nokia and Core Wireless that misaligns the
2 playing field here and that Apple is not able to get the
3 information that it needs to defend the testimony that you're
4 eliciting from these Nokia people.

5 Now, on these licenses, I think what I'm going to do
6 is -- I don't know that there's a point in trying to gather
7 all these up and produce them at this point. What I'm going
8 to say is that I'm going to -- Mr. Melin's deposition is
9 going to go forward and Apple can ask the questions of the
10 person presumably who knows about licensing practices and
11 how all this stuff works at Nokia. If it arises out of it
12 that the questions appear to call into question these
13 licenses and raise their relevance and make them important,
14 then I'll look at a further motion if you can't work
15 something out.

16 And I would encourage with my comments this to be
17 worked out, that is, that Core get with Nokia and produce
18 relevant documents. In other words, if Apple raises the
19 relevance, shows the relevance through deposition, y'all get
20 together and agree on a reasonable set or a grouping of
21 licenses that should be produced.

22 If Apple gets in the deposition and doesn't get
23 anything out of it, then it may go away.

24 I don't want -- I mean, I want Apple to -- to the
25 extent this is a real issue and really something your expert

1 is going to hone in on, they may be relevant. But just to
2 go on a big fishing expedition for every Nokia license, I
3 don't want to do that.

4 So I'm going to put that off, let the deposition go
5 forward.

6 Now, on this ETSI stuff, I am going to order that
7 produced. Whatever Nokia has, whatever Mr. Malkamaki has,
8 his involvement with ETSI, I'm going to order Nokia and Core
9 Wireless to search for that and produce that. I don't think
10 that is that -- that would be that difficult to do.

11 If y'all can discuss it and come to some accommodation
12 on that, that's fine, but I do think that if you're going to
13 depose him on that issue that was raised, those documents to
14 the extent they exist ought to be produced, in Nokia's
15 possession.

16 The same goes for any other deposition. Again, if Core
17 Wireless is going to take the deposition, I want reasonable
18 discovery to be accomplished through -- if it takes going
19 through Nokia, it does, and that's just going to have to
20 happen.

21 So any questions on these at this point?

22 MR. ALLISON: Yes, I think for -- we have four
23 witnesses who are inventors basically and so those are -- with
24 Mr. Melin I think it's clear what Your Honor is saying. With
25 the four inventors, I think as far as I know we produced all

1 technical documents related to the inventors. It appears
2 there's these ETSI documents, and to be quite honest, I'm not
3 sure what Apple is asking for. Does it -- are there ETSI
4 documents with respect to all four inventors you believe or --

5 MR. MUELLER: Your Honor, to be clear, I think one
6 good place to look would be the Hague Schedule which Core
7 Wireless does have, and we can work with them after this
8 hearing is over to make sure they understand which ones map to
9 which witness. We have been very, very specific about the ETSI
10 documents and what we're seeking, and I'm happy to share that.

11 THE COURT: Okay. Y'all work through that, but my
12 order is that Core is to work with Nokia to get whatever ETSI
13 association documents these particular witnesses have, look for
14 those and produce whatever they have.

15 I appreciate you produced the technical documents as to
16 the inventors, that's great, but I'm also going to order the
17 ETSI documents produced but I'm going to hold off on the
18 license issue.

19 MR. ALLISON: Okay. And that -- it may well be --
20 because again, I'm doing this in real time. It could be those
21 documents were collected by Nokia and whatever they had was
22 produced to us. I just don't know the answer to that.

23 THE COURT: That's fine. Look at them. Look at what
24 the requests are, get with Nokia and see what was produced.

25 MR. ALLISON: Understood.

1 THE COURT: Now, as to these remaining two witnesses,
2 Forssell and Aho, I guess, Mr. Allison, your position is that
3 they're employed by NSN and therefore you and Nokia are under
4 no obligation to produce these witnesses, is that right?

5 MR. ALLISON: Right. I guess I'm in a little bit of
6 an awkward position because I don't represent Nokia. All I
7 represent is Core Wireless.

8 Apple asked us to inquire of Nokia, and we have no
9 problem producing these witnesses. Core Wireless is not
10 against taking the depositions. We asked Nokia to do that.
11 They have been very cooperative with us with respect to
12 their employees but they basically said they didn't feel
13 they had the obligation to produce witnesses who are not
14 employees.

15 Basically there's no outstanding request from the Hague
16 Convention against them. They're a foreign company. They
17 have lots of requests all the time. The sense I get is
18 perhaps they're worried about setting a precedent that
19 people can come in and get -- you know, make some sort of
20 allegation that they are in fact controlling Nokia NSN and
21 they don't want to make that. That's my speculation.
22 That's not Nokia's -- I don't know what Nokia lawyers would
23 say about that.

24 So basically they said that they don't feel they have
25 the obligation to do so. So they're not employed by us. We

1 don't -- we can't control NSN. In fact, separately we
2 actually contacted the counsel for NSN and asked them to
3 provide the witnesses to see if they would do it themselves,
4 so we directly contacted them and we have not received a
5 response from NSN yet.

6 THE COURT: Well, in part, one of my issues is
7 that -- so Forssell is a named inventor?

8 MR. ALLISON: Right.

9 THE COURT: Now, I will say I sometimes question the
10 import of the inventor testimony, but that's -- I understand a
11 deposition of an inventor is typically done and, you know, may
12 have some importance. The ultimate import at trial sometimes I
13 question, but a deposition, that's something else.

14 But why -- you know, how can that person -- I
15 understand, you know, there are I guess -- I assume Apple is
16 going through the Hague Convention to try to obtain the
17 deposition. I understand going through that, but it's like
18 they're -- the problem is you're getting certain cooperation
19 from Nokia. That's the way it looks. And this is a named
20 inventor and this is a subsidiary of Nokia. I don't
21 really --

22 MR. ALLISON: Right.

23 THE COURT: The relevance is they're a named
24 inventor. If this was just somebody tangentially related,
25 that's one thing, but I don't really -- it's hard for me to see

1 how this person should not or could not be produced.

2 MR. ALLISON: Again, you're talking to the wrong
3 lawyer here. Basically we have asked Nokia for cooperation.
4 They are willing to give us their employees. They apparently
5 aren't willing to give us non-employees, and that's about what
6 we can do. We don't control Nokia. We don't control their
7 actions. And we in fact tried -- earlier in the case we
8 actually -- all the non-Nokia inventors we tried to contact to
9 see if we could get them. Our position is we like to have as
10 many inventors at trial as we possibly can, and we would be
11 very happy to have Mika Forssell at trial if he were available.

12 THE COURT: Okay. Let me --

13 MR. ALLISON: We called him and he didn't --

14 THE COURT: So what am I supposed to do with this,
15 Mr. Mueller?

16 MR. MUELLER: Here's what I suggest, Your Honor. I
17 guess one note and one suggestion.

18 If you look at page seven, Your Honor, of our
19 opposition brief, we have a chart -- I'm sorry. Page seven
20 of our opening brief we have a chart that lists the various
21 witnesses that are in play, and Mr. Sebire is not in play
22 anymore, but it lists the remainder and it shows the
23 employer for each one. Two of the witnesses that are being
24 made available to Core Wireless are at NSN.

25 MR. ALLISON: That's not correct.

1 MR. MUELLER: Well, in any event, Mr. Toskala was at
2 NSN?

3 MR. ALLISON: He's currently at NSN.

4 MR. MUELLER: So at least one of them is at NSN.
5 Moreover, as we sort of laid out in our reply brief, this is a
6 company, NSN, that Nokia says in securities filings to the SEC
7 it effectively directs and controls, lists its employees as
8 part of its corporate organization. It's a wholly owned
9 subsidiary.

10 You know, if Nokia were here, you could ask them what's
11 the basis and there really is none. But I think what you
12 can do, and this is my suggestion, Your Honor, if you were
13 to say to Core Wireless that the Court would preclude the
14 Nokia witnesses unless we get access to the ones we've
15 requested as well, that will create a very strong incentive
16 for Nokia, who's behind the curtain in this case, to make
17 available those witnesses. I think we would in short order
18 see them produced. And that's a remedy Your Honor has the
19 power to issue, preclusion unless they produce the witnesses
20 that we've requested as well, and that's the way to level
21 the playing field.

22 THE COURT: Mr. Allison, Mr. Toskala is NSN and he is
23 being produced?

24 MR. ALLISON: He was -- basically we called
25 Mr. Toskala ourselves early in the case when we were trying to

1 call all non-Nokia employees, and he agreed to cooperate with
2 us. He's one of the few that did agree to cooperate with us.
3 We did not get him through cooperation of Nokia. We got him
4 because he was a person that was interested in cooperating.

5 Mr. Vialen was the same thing. He works at a different
6 company as well. We called him and he seemed amenable to
7 working with us and appearing for deposition.

8 THE COURT: So your position on the SEC filings, NSN,
9 subsidiary of Nokia, they rely on that and say look, it's one
10 and the same, they control these people, it's just a shell game
11 here.

12 MR. ALLISON: Well, first of all, Nokia -- it was
13 Nokia Siemens. In 2007 Nokia Siemens was formed. It was a
14 joint venture between Nokia and Siemens. It was run as a
15 completely separate company and it ran that way for many years.
16 Last year apparently Siemens withdrew from that grouping and
17 Nokia became the sole owner again.

18 Again, I'm not a Nokia lawyer, but my understanding is
19 these are run as completely separate companies. They're the
20 same as they were when it was Nokia Siemens. They have
21 different legal counsel. They have different officers.
22 They have different product lines. They're just not the
23 same company. That seems to be the issue we're getting.
24 Again, this what we're getting from public information and,
25 you know, discussions with Nokia.

1 THE COURT: Well, here's what I'm going to do. My
2 preliminary order on this is that those associated with Nokia,
3 in other words, what I think it boils down to is Melin,
4 Malkamaki, Toskala and Lilja, I'm going to preclude them from
5 testifying at trial. Now, that's preliminary. In other words,
6 it's not final or anything, but I need to see the way the rest
7 of this case goes.

8 Now, Apple is making a push to depose two people,
9 Forssell and Aho. They say Forssell is a named inventor and
10 they say Aho has knowledge of Nokia standards related to
11 these patents-in-suit. If they are produced for deposition,
12 these other witnesses will testify, if that's the desire.
13 If they are not, then I'm going to look at it further. In
14 other words, I'm not going to prevent you from taking the
15 depositions, but as far as whether they're going to be
16 admitted at trial will depend on the conduct between now and
17 then.

18 MR. ALLISON: Right.

19 THE COURT: Again, if they're produced, Forssell and
20 Aho, no problem. If they're not, then I'm going to need to
21 look and see what happened between now and then and see whether
22 I'll keep my preliminary order in place precluding these other
23 witnesses from testifying or whether I'll lift that order and
24 permit them to testify.

25 But the conduct has got to be -- again, I'm concerned

1 about Nokia's cooperation with Core in bringing this action.
2 They're Nokia patents. Nokia, Mosaid, Core, they've all
3 kind of come up with this system where we're going to assert
4 these patents. And that's fine, but you've got some
5 cooperation no doubt from them, but to a limited extent.
6 I'm not going to let Apple just, you know, depose every
7 Nokia employee until the end of time, but on a reasonable
8 basis I think these witnesses could be produced leveling the
9 playing field and permitting everyone to testify and get
10 their cards on the table.

11 Who knows? None of this may ultimately come in. I
12 don't know. Depends on what's said. Depends on how it
13 goes. But as a discovery matter, I think to level the
14 playing field, this is going to be my preliminary order.
15 Any questions?

16 MR. ALLISON: We will convey that to Nokia.

17 THE COURT: All right.

18 MR. MUELLER: Thank you, Your Honor. Nothing
19 further.

20 THE COURT: All right. Anything further on any of
21 these motions? Anything further from Core Wireless?

22 MR. BUNSOW: No, Your Honor.

23 MR. MUELLER: No, Your Honor.

24 THE COURT: Let me before we conclude, just to get --
25 I know we're a ways off from trial but let me ask a couple of

1 questions. What is the length of trial that the parties are
2 now looking at at this point? Can you give me a ballpark
3 estimate? Mr. Bunsow, first for the Plaintiff.

4 MR. BUNSOW: Yes, Your Honor. From the Plaintiff,
5 ten days.

6 THE COURT: All right. Apple?

7 MR. MUELLER: I think that's about right, Your Honor,
8 within a couple days, plus or minus, but that's about right to
9 me.

10 THE COURT: How is the -- we've narrowed it to eight
11 patents. How is the invalidity side of the case going? In
12 other words, are y'all working well to get this narrowed down
13 to some reasonable numbers? We have eight patents to deal
14 with. I presume, I don't know, but eight sets of prior art.
15 How's that going?

16 MR. MUELLER: Yes, Your Honor, that's right, and I
17 would say two things. One is the parties entered into a
18 stipulation a few months ago pursuant to which Core Wireless
19 agreed to reduce the number of claims, and they did, and we
20 agreed to reduce the number of prior art references, and we
21 did.

22 I think there will be some further narrowing on both
23 sides with respect to the asserted claims and the prior art,
24 but we're certainly moving in the right direction on both
25 fronts.

1 THE COURT: All right.

2 MR. BUNSOW: We've just received their expert reports
3 on validity. Our rebuttal reports are due on Monday, and I
4 think at that time both sides can sort of step back with a view
5 toward simplifying things going forward.

6 THE COURT: All right. Good.

7 MR. BUNSOW: And we're also -- we think the Court's
8 claim construction could have an impact on that as well.

9 THE COURT: Right. We're working on that. We'll get
10 that as soon as we can.

11 Are there any other trial issues out of the ordinary
12 here that the Court can be made aware of? Anything from the
13 Plaintiff's perspective, any trial issues?

14 MR. BUNSOW: I can't think of any.

15 THE COURT: Okay.

16 MR. BUNSOW: But I haven't had a long time to think
17 about it.

18 THE COURT: I know it's a ways off.

19 MR. MUELLER: I think that's right. I can't think of
20 any, Your Honor. I do think today was very helpful in
21 providing guidance in the portfolio piece, which really would
22 have been a big wild card. But if we're limiting to the eight
23 patents-in-suit I think there's nothing I can think of right
24 now that would be outside the realm of ordinary trial practice.

25 THE COURT: All right. And I think from what I

1 heard, y'all have mediated the case?

2 MR. BUNSOW: We had a first mediation. I believe
3 there is in the schedule a second mediation.

4 MR. MUELLER: I think that's right.

5 MR. BUNSOW: September?

6 MR. MUELLER: I'm not sure of the date but I believe
7 that's right.

8 MR. BUNSOW: Judge Infante oversaw the first
9 mediation. I assume that he'll oversee the second, although
10 we're certainly open if you want somebody else. But he is
11 knowledgeable of the case and he's a pretty darn good mediator.

12 MR. MUELLER: I agree.

13 THE COURT: All right. Well, sounds like y'all are
14 on course to continue mediation and I appreciate the time
15 estimates. Just trying to get an idea at an early stage of
16 what we'll be looking at for scheduling purposes.

17 MR. BUNSOW: And the parties are talking too as well,
18 Your Honor, independently.

19 THE COURT: Very good. Continue to do that.

20 All right. Anything further?

21 MR. BUNSOW: No, Your Honor.

22 MR. MUELLER: No, Your Honor.

23 THE COURT: All right. Thank you for your arguments
24 and we're adjourned.

25 MR. MUELLER: Thank you.

MR. BUNSOW: Thank you.

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

Jan Mason

Date